BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LAWRENCE E. LANE	)	
Claimant	)	
VS.	)	
	)	Docket No. 242,547
MESLER ROOFING COMPANY	)	
Respondent	)	
AND	)	
	)	
CNA INSURANCE COMPANIES	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the September 11, 2003 Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on January 27, 2004.

APPEARANCES

James L. Wisler of Lawrence, Kansas, appeared for claimant. Timothy G. Lutz of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Award lists the transcripts and stipulations that constitute the record both for purposes of the Judge's Award and for purposes of this appeal. Additionally, at oral argument to the Board, the parties agreed claimant was temporarily and totally disabled from November 13, 1998, through June 9, 2000.

ISSUES

This is a claim for a November 11, 1998 accident.

In the September 11, 2003 Award, Judge Avery concluded claimant injured both his right upper extremity at the shoulder level and his right knee. Moreover, the Judge held K.S.A. 44-510c(a)(2) created a presumption that claimant was permanently and totally

disabled, which respondent and its insurance carrier had failed to overcome. Consequently, the Judge granted claimant permanent total disability benefits.

Respondent and its insurance carrier contend Judge Avery erred. They argue there is no evidence to support the finding that claimant is permanently and totally disabled. Conversely, they argue claimant injured his right shoulder and right knee and, therefore, he should receive permanent disability benefits for two "scheduled" injuries under K.S.A. 44-510d. Accordingly, respondent and its insurance carrier argue claimant should receive permanent disability benefits for a 19.67 percent functional impairment to the right shoulder and a 19.67 percent functional impairment to the right knee. They also argue they overpaid temporary total disability benefits for which they should receive a credit. Finally, they request the Board to deny claimant the right to seek future medical benefits.

Conversely, claimant requests the Board to affirm the Judge's finding that he is permanently and totally disabled. In the alternative, claimant contends he injured at least one of his front teeth and, therefore, he is entitled to receive benefits under K.S.A. 44-510e instead of benefits under the scheduled injury statute, K.S.A. 44-510d. Accordingly, claimant argues he has a 100 percent wage loss and an 87 percent task loss for a 93.5 percent work disability (a permanent partial general disability greater than the functional impairment rating).

The issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability?

2. Is claimant entitled to apply for medical treatment in the future?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

On November 11, 1998, claimant fell approximately 25 to 30 feet when a scaffold collapsed. The parties stipulated claimant's accident arose out of and in the course of his employment with respondent, a roofing company.

Respondent and its insurance carrier do not contest that claimant injured his right shoulder and right knee in that accident, which resulted in right knee surgeries and a right shoulder surgery. But respondent and its insurance carrier do challenge whether claimant sustained any permanent injuries to his teeth or jaw as a result of that accident.

1. Is claimant entitled to receive permanent total disability benefits?

The Judge correctly interpreted the Kansas Supreme Court's *Pruter*[1] decision in which the Court held that simultaneous injuries to an upper extremity and a lower extremity create a presumption of permanent total disability. The Court wrote, in part:

> Under the language of K.S.A. 44-510c, controlling case law interpreting the statute, and the presumption of an intent to change the law, we find that by the 1959 amendment to K.S.A. 44-510, the legislature intended that the combined loss of any of the listed members (eye, hand, arm, foot, leg) raises a presumption that the injured worker suffered permanent total disability.
>
> Pruter's combination injuries to her right arm and right leg should have been presumed to constitute a permanent total disability, consistent with the reasoning in *Honn*. However, K.S.A. 44-510c(a)(2) says that such a combination injury is presumed to constitute a permanent total disability "in the absence of proof to the contrary."[2]

Nonetheless, the Board finds and concludes that the record establishes that claimant was not permanently and totally disabled due to the injuries that he received in his work-related accident. None of the medical experts or vocational counselors who testified in this claim stated that claimant was either permanently and totally disabled or unable to work. Conversely, the medical evidence indicates claimant is capable of performing light to medium work. Moreover, at the March 2003 regular hearing, claimant testified he injured his left shoulder and fractured a vertebra in his back in a February 2000 automobile accident. Additionally, claimant testified he was unable to work as he needed back treatment.[3]

Claimant's medical expert, Dr. Truett L. Swaim, examined claimant in November 2000 and rated claimant under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.) as having a 23 percent impairment to his right upper extremity and a 23 percent impairment to the right lower extremity. Dr. Swaim concluded claimant could perform light to medium work despite the injuries sustained in the November 1998 accident.

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[1] *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

[2] *Id.* at 875.

[3] R.H. Trans. at 38-39.

One of claimant's treating doctors, orthopedic surgeon Dr. Larry Frevert, who operated on claimant's right shoulder and who performed the second surgery on his right knee, rated claimant under the AMA *Guides* as having a 16 to 18 percent impairment to the right shoulder and a 15 percent impairment to the right knee. Dr. Frevert concluded claimant should not return to the roofing profession but he could perform sedentary activities.

Dr. Peter Bieri, who examined claimant in August 2001 at the Judge's request, concluded claimant sustained a 19 percent functional impairment to the right shoulder and a 21 percent impairment to the right knee under the AMA *Guides* (4th ed.). Dr. Bieri also concluded claimant could occasionally lift up to 40 pounds, frequently lift up to 20 pounds, and constantly lift up to five pounds, which would permit claimant to perform light to medium work.

Both vocational counselors who testified in this claim, claimant's expert Michael Dreiling and respondent and its insurance carrier's expert Richard Santner, indicated claimant was not permanently and totally disabled. Mr. Dreiling testified there should be some type of light work that claimant would be able to do. And Mr. Santner testified he agreed with Dr. Swaim and Dr. Bieri that claimant could perform light to medium type work.

When considering the entire record, the Board concludes there is ample evidence to overcome the presumption of permanent total disability created under K.S.A. 44-510c(a)(2) (Furse 1993). Consequently, claimant is not entitled to receive permanent total disability benefits.

2. Is claimant entitled to receive permanent disability benefits for two scheduled injuries under K.S.A. 1998 Supp. 44-510d or permanent partial general disability benefits for an unscheduled injury under K.S.A. 1998 Supp. 44-510e?

Claimant contends he lost two front teeth due to the November 1998 accident and, therefore, his permanent disability benefits should be based upon the formula set forth in K.S.A. 1998 Supp. 44-510e. Claimant argues that the accident either injured the teeth or aggravated the underlying periodontal disease that preexisted the accident. It is not clear when claimant lost the teeth in question but the record does establish that claimant struck his mouth in the February 2000 automobile accident and had a tooth extracted following that incident.

K.S.A. 1998 Supp. 44-510e reads, in part:

> **Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto.** The

> extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

The Board concludes claimant has failed to prove he sustained any permanent injury to his teeth in the November 1998 accident or that the accident aggravated claimant's preexisting chronic periodontal disease.

The record establishes that claimant had severe periodontal disease dating back to at least the early 1990s. Long before the November 1998 accident, claimant's periodontal disease was so severe it caused bleeding around the gums and loose teeth.

In August 2001, Dr. Bieri examined claimant's mouth and teeth and discovered diffuse gingivitis and numerous missing teeth. Dr. Bieri found claimant's remaining teeth were uniformly loose and claimant's periodontal disease so severe he was unable to count the number of claimant's remaining teeth. But in July 1999, Dr. Robert F. Thompson, Jr., who is an ear, nose and throat specialist, evaluated claimant for any injuries to his mouth or teeth. Claimant told Dr. Thompson the November 1998 accident loosened four of his central upper teeth but they had since tightened up. Dr. Thompson found claimant had severe preexisting periodontal disease but he had no residual effects from the accident at work. Moreover, at his regular hearing claimant testified the dentist who removed one of the teeth in question was unable to determine if claimant's teeth problems were related to the fall at work.[4]

Because claimant has failed to prove he sustained any permanent injury to his teeth or that he aggravated his preexisting chronic periodontal disease, claimant's permanent

[4] R.H. Trans. at 36.

injuries are limited to his right upper extremity and his right lower extremity. As both extremities are covered by the schedules set forth in K.S.A. 1998 Supp. 44-510d, that statute governs claimant's disability benefits.[5]

3. What functional impairment has claimant sustained to his right upper extremity and his right lower extremity as a result of the November 1998 accident?

As indicated above, Drs. Swaim, Frevert and Bieri rated the functional impairment to claimant's right shoulder and right knee under the AMA *Guides*. The Board is not persuaded that any one particular rating is any more accurate than the other two. Accordingly, the Board averages all the ratings provided by the three doctors and finds claimant has sustained a 20 percent functional impairment to his right upper extremity at the shoulder level and a 20 percent functional impairment to the right lower extremity due to the November 1998 accident.

Consequently, claimant is entitled to receive permanent disability benefits under K.S.A. 1998 Supp. 44-510d(a)(13) for a 20 percent permanent partial loss of the right arm and shoulder and permanent disability benefits under K.S.A. 1998 Supp. 44-510d(a)(16) for a 20 percent permanent partial loss of the right leg.

4. Is claimant entitled to apply for medical treatment in the future?

Respondent and its insurance carrier contend claimant should not be permitted to apply for additional medical treatment in the future. The Board disagrees.

Medical compensation is one of the most important rights under the Workers Compensation Act. The Act requires an employer to provide an injured worker with the medical treatment that is reasonable and necessary to cure and relieve the injured worker from the effects of the injury. Kansas law is also well-settled that every natural and direct consequence that flows from a compensable injury is also compensable under the Act.[6] And once an injury is established as work-related, the progression of that condition remains compensable so long as the worsening is not shown to have been produced by a new and independent accident.[7]

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[5] *Pruter*, 271 Kan. 865.

[6] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

[7] *Nance v. Harvey County*, 263 Kan. 542, 952 P.2d 411 (1997).

Without being able to foretell the future, the Board has grave reservations in general about terminating a worker's right to seek additional medical treatment. Those reservations are heightened in this claim as claimant's surgeon, Dr. Frevert, indicated claimant had sustained an injury to the shoulder joint and, therefore, there is a risk of claimant developing arthritis in that joint and of needing additional treatment.

An order granting a worker future medical benefits upon proper application and approval by the Director of the Division of Workers Compensation is appropriate as the employer has the right to be heard on any issues regarding the necessity and reasonableness of the requested treatment as well as whether the condition for which the treatment is sought is directly attributable to the work-related injury.[8] Accordingly, the Board denies respondent and its insurance carrier's request to deny claimant the opportunity to apply for additional medical treatment in the future. Instead, the Board affirms the Judge's order that claimant may seek additional medical treatment by making proper application to the Director.

AWARD

WHEREFORE, the Board modifies the September 11, 2003 Award, as follows:

Lawrence E. Lane is granted compensation from Mesler Roofing Company and its insurance carrier for a November 11, 1998 accident and resulting disability. Based upon an average weekly wage of $320, Mr. Lane is entitled to receive 82.14 weeks of temporary total disability benefits at $213.34 per week, or $17,523.75, plus 28.57 weeks of permanent partial disability benefits at $213.34 per week, or $6,095.12, for a 20 percent permanent partial disability to the right upper extremity at the shoulder level, making a total award of $23,618.87, which is all due and owing less any amounts previously paid.

Lawrence E. Lane is granted compensation from Mesler Roofing Company and its insurance carrier for a November 11, 1998 accident and resulting disability. Based upon an average weekly wage of $320, Mr. Lane is entitled to receive 40 weeks of permanent partial disability benefits at $213.34 per week, or $8,533.60, for a 20 percent permanent partial disability to the right lower extremity, making a total award of $8,533.60, which is all due and owing less any amounts previously paid.

Future medical benefits may be requested upon proper application to the Director.

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[8] *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James L. Wisler, Attorney for Claimant
Timothy G. Lutz, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director